

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

BRIEF FOR APPELLEE

830

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

830

No. 9846

RAYMOND HOCKADAY, *Appellant*,

v.

RED LINE, Inc., a corporation, *Appellee*.

United States Court of Appeals
for the District of Columbia
Circuit

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BRIEF FOR APPELLEE.

INTRODUCTION.

An introduction is used in this brief for a definite purpose, that is, to supplement the statement of facts which generally in itself represents the introduction. This procedure has been made necessary because of the unusual approach which the appellant has adopted in his argument on the issues raised by him.

Nearly one half of the appellant's brief is devoted to a statement of facts, and in order to properly reply to his argument it is necessary to first establish the apparent purpose for this emphasis on that phase of the brief.

The emphasis on the statement of facts is adopted for the reason that the appellant would have the court believe that

the verdict of the jury for the defendant was based entirely on prejudice, without substantial legal grounds to support its verdict on the question of liability. This is done because the question of prejudice was never raised in the lower court, and now in order to adopt it as a ground for reversal there must be some apparent basis. The only one available is to claim absolute liability, and thereupon attempt to bring this case within the rule of *Campion v. Brooks Transport, Inc.*, 77 U. S. App. D. C. 293, although there is no similarity between the two cases.

The first part of the statement would attempt to convey the impression of absolute liability on the part of the defendant. The second part outlines the seriousness of the injuries sustained by the plaintiff, and then from these premises the conclusion is drawn that there could be no verdict except for the plaintiff, and any other verdict must be based upon prejudice. If both premises were correct then there might be some support for the conclusion, but if either premise is incorrect, then the conclusion is unsound. The appellee questions the correctness of the first premise, but now, as always, concedes the correctness of the second.

Regarding the first premise, there was substantial evidence introduced by the defendant to support the verdict. In addition the evidence introduced by the appellant in the trial was not conclusive on the question of liability, and justified the verdict without regard to any prejudice which the appellant now for the first time on appeal contends influenced the jury. At no time during the entire proceedings in the court below did the appellant ever raise the question of prejudice.

To disprove the first premise of the appellant, that is, that absolute liability existed, it is only necessary to review partially the evidence which is replete with contradictions of material facts by the plaintiff's witnesses, who in turn substantiate the testimony of the operator of the appellee's motor vehicle.

COUNTER STATEMENT OF FACTS.

The appellant testified that he stood with his back to the state truck, with his left hand extended into the state truck, and while doing this, he was looking to the right in the direction from which the appellee's truck was travelling (R. 16, 69), but notwithstanding his observation of the truck which could be seen for a distance of 300 feet (R. 230), he did not see the appellee's truck until it was 40 feet away (R. 73), and while he was standing in that position, the appellee's truck slid along the side of the truck against which he was standing (R. 74). Other witnesses called by the appellant denied that the appellee's truck slid alongside of the state truck (R. 94, 108, 142). Another witness for the appellant testified that the appellant was not standing as testified to by the appellant (R. 137), and the testimony of this witness was contradicted by his own statement given prior to trial (R. 147, 148, 356, 357). Another witness contradicted the testimony of all other appellant witnesses, including the appellant, by stating that the appellee's truck came towards the state truck at an angle and after the impact veered away, and that the left rear wheel of the trailer ran over the appellant (R. 225, 226). Still another witness did not see the accident (R. 296).

As opposed to this contradictory and indecisive testimony on the part of the appellant, the testimony of the appellee's driver was clear and decisive. He testified that he saw the road signs and slowed down (R. 326), and as he approached the state truck he was travelling between 20 and 25 miles per hour (R. 327). He testified that he saw the appellant's witness standing in the rear of the state truck, and this man waved to him to pass (R. 327, 328). He testified that the appellant was not in sight as he approached the state truck, and when the left fender of the tractor was passing the state truck, appellant stepped from the running board of the state truck into the fender of his motor vehicle (R. 328), and after the impact he applied the brakes to his equipment in such a way that it could be brought to

a stop (R. 329). Witnesses called by the appellant confirmed the testimony of the driver that the appellant was struck by the left front fender (R. 108, 219).

It certainly cannot be disputed that a review of all the testimony clearly shows the lack of absolute liability on the part of the appellee. On the contrary, if the jury believed the testimony of the appellee's operator, then there could be no recovery by the appellant. In addition, the jury, because of the contradictory testimony of the appellant's witnesses could refuse to accept their testimony as true. The jury observed the appearance of all the witnesses, and it was within its province to attach to the testimony the weight which they believed should be given to the testimony of each. The appellee in this brief does not deem it necessary to enter into discussion of the facts, for the reason that on the testimony of negligence alone the verdict of the jury was justified. This must certainly be apparent to the appellant, but he must refuse to accept this apparent situation because otherwise his entire theory of prejudice would be destroyed.

SUMMARY OF ARGUMENT.

1. Both direct and cross-examinations were proper and within the sound discretion of the trial court.
2. The testimony taken out of the presence of the jury was properly ruled inadmissible by the trial court.
3. Appellant's request for a charge on the last clear chance doctrine was within the sound discretion of the trial court, was not supported by the evidence or issues, and was properly denied by the trial court.
4. The jury are the sole arbiters of the facts and weight of the evidence, and since their verdict was reasonable and proper, it should be upheld.

ARGUMENT.

It having been established that there was no absolute liability on the part of the appellee, the first premise fails to support the conclusion. This being true, it leaves the question of prejudice standing alone. As previously stated, the question of prejudice was raised for the first time on appeal, and the record in the trial court is silent on that point. The appellant bases his theory of prejudice on questions propounded both on direct and cross examinations. A review of these questions and answers, however, reveals that each question was material and proper, and the attitude of appellant's counsel during the trial certainly shows that he felt there was no prejudice at that time.

To much of the disputed examinations, appellant failed to raise objections in the Court below. Upon analysis, appellant's specifications of error relative to alleged evidentiary errors consist of some 13 points. The following four, though alleged as error now, were permitted into evidence with no objection by appellant; plaintiff's suspended sentence which was later revoked; whether plaintiff had been in the military service; defense witness saying plaintiff had stated he was injured overseas; and defense witness saying plaintiff had lied about being overseas. In addition, appellant alleges as general error that the testimony tended to bring plaintiff into disrepute and to prejudice the jury, but no objection was made upon either point during the course of the trial.

To testimony relative to the undesirable habits of plaintiff, counsel for appellant merely said, "I object and ask that it be stricken out." (R. 384.) Error is alleged in the admission of testimony relative to whether or not plaintiff had lied to his landlord as to his having received his injuries in combat, and also whether or not plaintiff was noisy and given to carousing and drinking. To admission of the former, it is well to note that counsel for appellant objected twice; once to claim that it was immaterial (R. 46, 47); and the other not being to the question itself, but merely that the

answer was not responsive (R. 389). To admission of the latter, relative to plaintiff's habits, appellant's counsel once again did not object specifically to the question asked, but in reality to the answer given (R. 390).

To other portions of the testimony, only the general objection of immateriality was raised. In some instances, the objections were sustained (R. 55, 59, 384), and in others overruled (R. 44, 57, 253). This testimony related to the source of plaintiff's income (R. 53, 253); with whom plaintiff lived (R. 55, 57), although no objection was made when the mother of plaintiff testified (R. 250); plaintiff's drinking of intoxicants (R. 59, 384), although counsel for the appellant seemed to waive his objection by asking merely that counsel for appellee be held to some evidence of the fact (R. 60). Objections to other testimony were sustained, and the matter stricken (R. 385, 389). Failure of specific objection is sufficient to deny the right of review to the complaining party on appeal. Appellee submits that the appellant cannot seek relief where he made no objection and that those objections of appellant, actually made, were not specific enough to come within the rule of these cases.

In *Johnson v. Reily* (82 U. S. App. D. C. 6, 160 Fed. 2nd 249) at page 7 the Court stated:

"The rule is universal, that where an objection is so general as not to indicate the specific grounds upon which it is made, it is unavailing on appeal, unless it be of such a character that it could not have been obviated at the trial."

This rule was followed in *Norwood v. Great American Indemnity Co.* (146 Fed. 2nd 797, 800) holding:

"A specific objection overruled will be effective to the extent of the grounds specified, and no further. An objection overruled, therefore, naming a ground which is untenable, cannot be availed of because there was another and tenable ground which might have been named but was not."

And in *Donovan v. Brown* (75 U. S. App. D. C. 93, 124 Fed. 2nd 295):

“It is a salutary rule that errors which the trial court is given no opportunity to correct will not, in general, be considered on appeal.”

Appellant comes squarely within this rule, having made no objection whatsoever to portions of the examination which he now claims to be in error. *District of Columbia v. Disney* (65 App. D. C. 138, 81 Fed. 2nd 272) holds, that when no objection or exception was taken to the admission of testimony, there was no basis for an assignment of error. To the same effect is *Phillips & Sager v. Kern* (50 App. D. C. 317, 271 Fed. 547) which said that an error assigned in the admission of evidence need not be considered where no objection or exception was reserved.

In general, the rule as laid down in *Shepler v. Crucible Fuel Co.* (140 Fed. 2nd 371) is quite applicable. At page 374, the Court said that:

“The law requires that errors, to be reviewable, must have been definitely and timely called to the attention of the trial court, in order to afford that court a fair opportunity to pass upon the matter, and correct its own errors, if any.”

See *Arizona Power Corporation v. Smith* (119 Fed. 2nd 888), saying at page 891:

“Appellants complain of the admission of testimony of appellee’s witness . . . this testimony was received without objection. Hence its admission cannot be deemed error.”

Also see *Reidy v. Myntti* (116 Fed. 2nd 725, 728):

“(The evidence) was not objected to in the trial court, and having been admitted without objection is now competent evidence in the cause.” (Paren. added.)

Two other Federal decisions are most applicable to the case at bar. Appellee submits that appellant comes within the rules as put forth by these cases, but is attempting to

contravene them. In *Policy Holder's Nat. Life Ins. Co. v. Harding* (147 Fed. 2nd 852, 855), it was held:

“Defendant complains that the court admitted evidence either without ruling on its objections or by taking the answers subject to the objections. No further request was made for a ruling in any instance in the course of the trial. Under these circumstances the defendant is not entitled to a review of his objections by this court.”

This Court is also referred to *Mut. Benefit Health & Accident Ass'n v. Francis* (148 Fed. 2nd 590, 598):

“We should not reverse the court for its ruling on the admissibility of evidence upon grounds not urged in the trial court.”

“There was no abuse of discretion in overruling the objections actually made to this testimony. Whether or not it may have been subject to other objections we need not determine.”

Assuming without admitting that some of the trial court's rulings were reserved for review, nevertheless these rulings were correct.

Cross-examination of the plaintiff on his assault conviction was perfectly proper. When there is a pertinent statutory provision, the Court is bound by its language. Therefore, it is well to note the D. C. Code, 1940, Title 14-305, which reads in part:

“No person shall be incompetent to testify in either civil or criminal proceedings, by reason of his having been convicted of a crime, but such fact may be given in evidence to affect his credit as a witness or by evidence aliunde; and the party cross-examining him shall not be concluded by his answers.”

In the case at the bar, plaintiff had been convicted of the crime of assault, thus rendering appellant's citations inapplicable. This Court in *Bostic v. United States* (68 App. D. C. 167, 94 Fed. 2nd 636) held at page 168 that:

“The test provided by Congress is clear and certain. Any person who has been convicted of a crime, i.e., a felony or misdemeanor, may have that fact given in evidence against him to affect his credibility as a witness.”

In *Goode v. United States* (80 U. S. App. D. C. 67, 68, 149 Fed. 2nd 377), the Court noted that statutory language controls, by saying that:

“We have stated more than once that when an accused offers himself as a witness, his credibility may be impeached as in the case of any other witness, and that, by local statute, irrelevant though they may appear to be, previous convictions of a crime may be shown to that end.”

Also see *Hall v. Gordon* (76 U. S. App. D. C. 33, 128 Fed. 2nd 461).

The question as to how far this examination may go is well within the sound discretion of the trial court. An excellent statement of this proposition is found in *United States v. Boyer* (80 U. S. App. D. C. 202, 203, 150 F. 2nd 595) wherein it was said that:

“Just where to draw the line, in order to avoid both unfairness to the witness and confusion of issues, is a question which must frequently arise. The correct rule in such cases, we think, is to recognize a wide discretion in the trial judge. He observes the conduct of counsel, the reaction of the witness under examination, and the resulting effect on the jury. In other words, he is aware as no appellate court can be of the courtroom psychology and can best determine whether particular testimony should or should not be received.”

It thus becomes evident that this cross-examination by appellee's counsel was well within the bounds of the trial court's discretion. The true complete text of the disputed questions asked together with the answers to the same is to be found in the Record, (R. 44, 45, 46), rather than the paraphrased version as stated by appellant. The testimony given by plaintiff in response to these questions was

obviously contradictory in some particulars. Therefore, appellee's counsel was perfectly justified in acting to attack the credibility of the witness.

Reference is made by appellant to the cross-examination on the work habits of the plaintiff. A similar situation arose in *Jennings v. United States* (73 Fed. 2nd 470), where the suit was initiated to claim disability under a policy of war risk insurance. At page 472, it was said:

“When the plaintiff's failure to work was put forward as evidence of his disability, it was defendant's right on cross-examination to develop facts throwing light on what his failure to work was due to, whether to inability or to the lack of a felt necessity. . . . The trial judge made clear the limited purpose of its admission. As so admitted and limited, there was no error.”

It was so admitted for that purpose in the case at bar, (R. 391, 393). It is clear that a person not working from a desire not to do so is in a different category from one who cannot work due to some disability. It is submitted that this entire line of questioning, aimed at showing that plaintiff's failure to hold a job was due primarily to his unwillingness to work, was well within the scope of cross-examination. Also see *Sawyear v. United States* (27 Fed. 2nd 569).

The purpose of cross-examination is to both clarify and attack the testimony submitted on direct examination. Its direction lies with the trial court in its sound discernment. See *Callahan v. United States* (35 Fed. 2nd 633). In general, however, its scope must be extremely broad. The Circuit Court of Appeals in *United States v. Manton* (107 Fed. 2nd 834), at page 845, described this purpose by saying:

“The office of cross-examination is to test the truth of the statements of the witness made on direct; and to this end it may be exerted directly to break down the testimony in chief, to affect the credibility of the witness, or to show intent. The extent to which cross-examination upon collateral matters shall go is a mat-

ter peculiarly within the discretion of the trial judge. And his action will not be interfered with unless there has been upon his part a plain abuse of discretion."

See also *Minnehaha County, S. D. v. Kelley* (150 Fed. 2nd 356).

The trial judge has before him the parties to the action, counsel, and the witnesses. He may best observe their demeanor on the witness stand, and the reaction of the jury to them. Bare statements in the record may differ markedly from their affect in the courtroom. It is for these very reasons that such matters as scope of examination are left largely to the discretion of the trial court. Other Federal Courts have held similarly. See *Viereck v. United States* (130 Fed. 2nd 945, rev. other grounds 318 U. S. 236), where the Court said at page 961 that:

"The problem of balancing freedom of cross-examination, assuming that it is material cross-examination against other policy is one within the discretion of the trial court."

Also see *Atlantic Greyhound Lines v. Isabelle* (157 Fed. 2nd 260, 262) that:

"Generally it is proper to permit upon cross-examination the bringing out of anything tending to contradict, modify or explain the testimony given by a witness on his direct examination."

At the same time, it cannot be overlooked that primarily the cross-examination in dispute was that of the plaintiff. He is obviously an essential element of the action, and as such, should be subject to a more searching inquiry than any other witness. See *Hyland v. Millers Nat. Ins. Co.* (58 Fed. 2nd 1003, 1010) holding that:

"The cross-examination of a party is allowed more latitude than that of other witnesses, and it is within the court's discretion to permit cross-examination as to matters not covered in the direct examination."

Much is made of the fact by appellant that the response of the witness for the defense, Mario Bennie, on direct examination, was supposed to have contradicted the plaintiff on a collateral matter, (R. 388, 389). Appellee grants that ordinarily it would be bound by the answer of plaintiff on a collateral matter. However, a careful reading of the testimony in dispute indicates that essentially no contradiction occurred. Plaintiff claimed that he had never told Bennie that his injuries were suffered in combat, (R. 46). In their record order on this point, Bennie's answers merely said that plaintiff had discussed the injuries with him; plaintiff had shown these injuries to him, adding the phrase, "he got overseas"; plaintiff had told him subsequently that these injuries were sustained in a Virginia automobile accident. Unless the words "combat" and "overseas" are synonymous, no contradiction took place. It is surely a matter of common knowledge that many of those in service were overseas though never engaging in combat with the enemy. The use of the word "combat" includes the connotation of overseas, but does not exclude it. Further analysis of the record shows the word "overseas" as used to Bennie could easily have signified an injury at any time, while in a foreign land as a civilian, and not during time of war. The Court's attention is directed to the fact that the objection made to the testimony of the witness Bennie was merely on the ground that the answer was not responsive (R. 389), and the question of contradicting the appellant on a collateral matter was not raised until this appeal.

Appellant also raises the issue of the plaintiff having been cross-examined as to particular acts, apparently referring to character. It is submitted that such questioning was at the same time admissible as attacking credibility, reasons for not working, et al. Since specific questions were not attacked, a more definite answer is not possible by appellee, but an examination of the law as laid down by Federal Courts shows that such examination is within the sound discretion of the trial court. This Court in a recent

case, *Lindsey v. United States* (77 U. S. App. D. C. 1, 133 Fed. 2nd 368), said at page 2 that:

“In respect of such things as needless protraction, conduct of an examination in a manner unfair to a witness, undue inquiry into collateral matters to test credibility, and the like, cross-examination is properly within the discretion of the trial judge, and there can be no reversal except for abuse.”

In an earlier decision, *Wash. & O. D. Ry. Co. v. Smith* (53 App. D. C. 184, 189, 289 Fed. 582), the same Court held that:

“So far as the record discloses, the questions were pertinent to nothing brought out on direct examination. They were not material or relevant to any of the issues in the case, and were admissible on cross-examination only on the theory that they tested the memory and therefore to some extent, the credibility of the witness. Whether questions of that kind shall or shall not be answered is a matter largely in the discretion of the trial court, and appellate tribunals will not interfere with the exercise of that discretion unless it is clear that injury to the appellant resulted therefrom.”

Another Federal Bench in *Sawyear v. United States* (supra, page 7) held very forcefully at page 570 that:

“A witness may be impeached by testimony that he bears a bad reputation for veracity, or by showing that he has been convicted of a criminal offense within certain classes; but the weight of his testimony, as well as its credibility, may be affected by other circumstances, and within a reasonable range inquiry may be made touching his occupation and the environment in which he chooses to live. The rule is too well settled to require extensive citation. . . . The extent to which such inquiry may be pursued both to the period covered and the specific details must of necessity be left largely to the discretion of the trial court.”

Surely no further comment should be necessary upon the propriety of the examination in dispute. The mere fact

that the plaintiff was seriously injured, and the jury found for defendant, certainly is not indicative of prejudice, as is submitted by appellant.

2. The testimony taken out of the presence of the jury, was not admissible. Appellant rests his claim for admissibility upon the grounds of *res gestae*, impeachment, and contradiction, none of which would permit its introduction in the case at bar.

The requirements for a statement to be admitted as part of the *res gestae* are that the statement be spontaneous, and closely related in time to the transaction in question. It has often been put that the act must be speaking through the witness, since it is in effect an exception to the hearsay rule, and its authenticity must have been guaranteed in that way. An examination of the Record, (R. 236, 237, 239, 298, 299), wherein the alleged conversation of the driver was mentioned, shows that such a groundwork guaranteeing veracity was not laid. Not only is no time interval given by the record, but the sole reference to the physical or mental state of the driver was the non-responsive answer to a question of appellee's counsel, (R. 299), that "he seemed to be very much scared," which is certainly no evidence of the necessary distrait state for *res gestae*. A certain amount of fright does not destroy logical thought. However, evidence of reflection upon the part of the driver is indicated by his not answering alleged queries relative to signs, (R. 239, 299). In a similar situation, where an auto collided with a truck, and appellant attempted to introduce an alleged conversation between the truck driver and the witness as *res gestae* the driver being silent when asked a question, *Wicker v. Scott* (29 Fed. 2nd 807, 809) held that:

"It was something done in deliberation . . . the driver was thinking of consequences . . . (and) refrained from further comment. This was not the act of one who was distrait, or laboring under excitement, but was a deliberate act, which, in our opinion, was not a part of the *res gestae*." (Paren. added.)

See *Swinger v. Fireman Equipment Corporation* (94 Fed. 2nd 269, 271) holding:

"Further errors were assigned by appellant with respect to the court's refusing to permit the relation of conversations had with the truck driver after the collision. We think they were no part of the *res gestae* but were a mere recital of past events; and were properly refused."

To the same effect, see *Kelley v. Dickerson* (13 N. E. 2nd 535), in which the driver of the car in which appellee had been riding said some 15 minutes after an accident that "he was driving wide open", and appellant maintained that this was admissible as part of the *res gestae*. The Indiana Supreme Court, at page 541, said:

"Appellant's contention is that this statement was admissible under the doctrine of *res gestae*. It is clear from the answer given by appellant, that (the driver) was narrating the facts after the accident. His statement was not an exclamation made at the time, or in any manner connected with the accident. The doctrine of *res gestae* is based upon spontaneous statements . . . and never includes a statement or a narration of past events." (Paren. added.)

Of course, the burden of showing any alleged statement as part of the *res gestae* rests with the proponent. In the case at bar, it is evident that such a burden has not been met. See *Johnson v. Swords Co.* (3 N. E. 2nd 705, 296 Ill. App. 377) which also held that a conversation with a truck driver shortly after an accident was not *res gestae* since the trial court ruled that it was not, and thus at the same time, it was not admissible against his principal. In *Aetna Life Ins. Co. v. Kern-Bauer* (62 Fed. 2nd 477), the decedent had had a conversation with witnesses relating to a possible cause of his death, and the Court held it inadmissible as *res gestae*, saying at page 479 that:

"The burden is upon the proponent of evidence to show its admissibility. That burden was not carried

... the record is still silent as to how long a time elapsed ... the proof leaves the circumstances in the realm of pure conjecture and that is not enough."

On the same page, the Court further went on to say such questions were within the sound discretion of the trial court:

"It is for the trial court, in the first instance, to determine the fact as to whether the circumstances under which the statement was made were such as to exclude the probability of it being deliberately made; as in other cases, the presumption is that the trial court decided the fact correctly."

In *Woods v. Southern Ry. Co.* (73 S. W. 2nd 374), decedent's statement made 4 to 5 minutes after his injury was held not to be *res gestae*, the Court saying that the burden rests upon the party who offers a declaration as part of the *res gestae* to show that it was in fact spontaneous. See also *Panhandle & S. F. Ry. Co. v. Huckabee* (207 S. W. 329) holding that it is largely up to the discretion of the trial court.

Other Federal Courts have held similarly, that the admission of evidence as part of the *res gestae* is addressed to the sound discretion of the trial court. See *Ybor v. United States* (31 Fed. 2nd 42), and *Wilson v. Beckett* (79 U. S. App. D. C. 94, 143 Fed. 2nd 19).

Furthermore, the order in which evidence is admitted and the conduct of the trial is of necessity also for the discretion of the trial judge. In *Washington R. & E. Co. v. Dittman* (44 App. D. C. 89), this Court at page 93, said that:

"The mode of conducting trials and the order of introducing evidence, and the time when it is to be introduced, are matters properly belonging very largely to the practise of the court where the matters of fact are tried by a jury."

Also see *Lansburgh v. Wimsatt* (7 App. D. C. 271).

In the case at bar, the trial court ruled such evidence im-

proper when eventually offered. It must also be noted that the trial judge did not rule that this proffered testimony was part of the *res gestae* but merely said that he wasn't sure that "part of it might not be admitted as part of the *res gestae*," (R. 223). He also said that he *might* have considered it under an offer of *res gestae* if brought up earlier, (R. 416). Appellee submits that nothing in the record indicates that the trial court did in point of fact consider such testimony as part of the *res gestae*, and that he at no time gave any ruling that it was such.

The proposition that alleged admissions of the truck driver are not admissible against his principal is so extensively known as not to warrant any lengthy citation. It is evident that any such alleged admissions were not within the scope of employment. See *Johnson v. Swords Co.* (supra, page 15). Therefore, the sole remaining basis raised by appellant upon which such an alleged conversation might be admissible would be to impeach the truck driver. Appellant attempted the introduction of this testimony, (R. 408), following the introduction of his rebuttal testimony, (R. 396), and subsequent to his statement "that is all" in reference to his case and testimony, (R. 400), but at the same time, appellant considered this testimony simply rebuttal (R. 416).

Three earlier District cases on this point should be noted. See *King v. Rhodes* (47 App. D. C. 317) in which the excluded evidence was offered after plaintiff had closed his case in chief and defendant had moved for a directed verdict which the trial court had indicated that it would grant. The Appellate Court held that, unless there had been such an abuse of discretion as to be a miscarriage of justice, they would not interfere in such a case. Also see *Olmstead v. Webb* (5 App. D. C. 38) holding that when evidence is offered out of order, or at the wrong stage of a case, the admission or rejection of such evidence is a question peculiarly within the trial court's discretion, and its decision would not be disturbed unless there were extremely strong

reasons in the interests of justice. See also *Prindle v. Campbell* (7 Mackey [D. C.] 598) which ruled even more strongly that it was entirely within the discretion of the trial court to decide on the admission of evidence offered as rebuttal which should have been offered in chief, and that no exception lay from his ruling. Thus it would seem to be almost wholly within the trial court's discretion, as was soundly exercised in the case at bar.

Appellee contends in line with the holding of the trial court that no proper foundation for this testimony was laid, (R. 409, 410, 413) as was the understanding when the testimony was taken, (R. 87, 88, 89, 237). See *Stinson v. Aluminum Co.* (141 Fed. 2nd 682). This Court in *Gordon v. United States* (53 App. D. C. 154, 289 Fed. 552) ruled that:

"It is a well settled principle that a witness cannot be discredited or his hostility or bias shown by proving statements made by him outside of court which do not harmonize with the statements made by him on the witness stand, until his attention has been called specifically to the former statements, with particularity as to time, place, and circumstances, so that he can deny or explain them."

In the same year, still another Federal Court in *Bennett v. Hoffman* (289 Fed. 797, 798) said:

"The statement of (defendant's chauffeur) was made outside of the scope of his employment and hence was hearsay as to defendant. In order to introduce rebuttal, for the purpose of impeaching the testimony of a witness given on cross-examination in respect to some admission or contradictory statement, the attention of the witness must be called to such admission or contradictory statement . . . (chauffeur was not permitted to answer in this case). . . . Thus the situation was that, on rebuttal, independent new testimony was introduced to impeach (chauffeur's) testimony in regard to subject matter to which (he) in legal effect, had not been interrogated." (Paren. added.)

Since consideration of the proper foundation is largely to the discretion of the trial court, appellee contends no error was committed.

Ewing v. United States (77 U. S. App. D. C. 14, 135 Fed. 2nd 633), as cited, must of necessity be amplified to cover what this Court held on page 24 by saying that:

“Our present rule is limited to the facts of this case, and similar situations, where the circumstances are such that the declaration takes on the character of a statement of fact or of facts in a nutshell, rather than merely that of the witness’ opinion or conclusion drawn from facts of which he does not have knowledge or has only such partial knowledge that the element of opinion outweighs the factual effect of the statement.”

A careful analysis of the case indicates that the Court limited the rule to criminal cases, and by inference, more particularly to where the witness had expressed a belief in defendant’s guilt, and then gave factual testimony. Therefore, appellee fails to see any persuasive relevancy to the case at bar.

3. Appellant’s request for a charge on the last clear chance doctrine was within the sound discretion of the court. Appellee submits that the trial judge in saying that the point of whether plaintiff used reasonable care to get away from danger, (R. 448), is saying in effect that the evidence does not completely conform to all the requisites for last clear chance. At the same time, the trial judge, by saying that if appellant had requested it before, he thinks that he would have so charged, does not definitely indicate that he was satisfied all requirements were met, but merely that he would have considered the matter at more length.

Appellee is willing to grant that the doctrine of last clear chance may have been applicable to the case at bar. However, appellee maintains that the issue of last clear chance was not raised by the pleadings and therefore was not in issue during the trial. Appellant never pleaded plaintiff to have been negligent, nor did he ever raise its possibility

during the course of the trial. Appellee, on the other hand, never raised the issue of contributory negligence, other than making the usual request for a charge on the matter, (R. 284). See *Carpenter v. Baltimore & O. R. Co.* (109 Fed. 2nd 375, 379), wherein the Court held:

“The appellee did not plead contributory negligence or assumed risk as a defense, and no inference of either upon the part of appellant is found in his pleadings, and no issue is made upon the instructions. Applying the well-recognized rule that in determining the scope of instructions, the court must keep in mind the issues as made by the pleadings, in the cause, and that no instructions be given which tender an issue not supported by the pleadings, the court committed error (in charging as above).” (Paren. added.)

Reference must be made to the order signed by the pre-trial judge which framed the issues of the case. Careful examination of that order reveals quite clearly that appellant did not consider plaintiff negligent, and thus last clear chance was never put into issue. Rule 16 of the Federal Rules of Civil Procedure contains the controlling law. In accord with this rule, the District Court for the District of Columbia has said, in *Geopulos v. Mandes* (35 Fed. S. 276), that stipulations made at pretrial are binding on the parties, and the subsequent course of the action is to be governed by them. Other Federal Courts interpreting Rule 16 have expressed themselves at greater length. In *Fowler v. Crown-Zellerbach Corporation* (163 Fed. 2nd 773, 774), it was held:

“The pre-trial order does no violence to the issues as framed by the complaint. More importantly, the record discloses no objection to the order attacked. So far as we can determine, it was made with the cooperation and assent of both parties. There was no reservation of the point now urged, nor does there appear to have been any request for the amendment or modification of the order in the course of the trial. The pre-trial conferences held by the court and the order en-

tered as a result thereof were authorized by Rule 16 of the Federal Rules. One of the purposes of such a conference is the simplification of the issues, and the rule provides that "the court shall make an order which recites the action taken at the conference—and which limits the issues for trial to those not disposed of by admissions or agreements of counsel; and such order when entered controls the subsequent course of the action, unless modified at the trial to prevent manifest injustice, (thus appellants were not in a position to complain of pre-trial order)." (Paren. added.)

In *Fanchon & Marco v. Hagenbeck-Wallace Shows Co.* (125 Fed. 2nd 101), the Court, at page 104, said that:

"By a pre-trial order (giving date), this issue was excluded from the case, thus obviating the need of finding thereon. There is, therefore, no merit in appellant's contention that, for lack of such a finding, the judgment should be reversed." (Paren. added.)

A primary aim of this Rule, abolishing that which seems to coincide with what appellant desires, was well expressed in *Burton v. Weyerhaeuser Timber Co.* (1 Fed. Rules Dec. 571, 573) by saying:

"I cannot escape the impression that there was some connection between the failure to observe the direction to prepare and to submit the pre-trial order well before the trial, and the surprise issues raised at the trial. I can sympathize with the desire of counsel, experienced in the older forms of practice, to withhold disclosure of such dramatic issues until the midst of trial, but it must be made clear that surprise, both as a weapon of attack and defense, is not to be tolerated under the new Federal procedure . . . the new rules outlaw the sporting theory of justice from Federal Courts."

See *Bryant v. Phoenix Bridge Co.* (43 Fed. S. 162) which held that the trial court could give no instruction to the jury nullifying the effect of a pre-trial order, or inconsistent with the issues as framed in that order. Also see

Berry v. Spokane, Portland & Seattle Ry. Co. (2 Fed. Rules Dec. 483) to the same effect.

Since it is evident, therefore, that last clear chance was not in issue, the trial court could not abuse its discretion by charging on that matter. In *Liberty Mut. Ins. Co. v. Arnold* (118 Fed. 2nd 47), the Court said that a trial judge is not required to charge on an issue not pleaded and not supported by substantial evidence, since to do so might well tend to confuse the jury. Also see *Kennedy Lumber Co. v. Rickborn* (40 Fed. 2nd 228, 230), holding that "It is error to submit a case to a jury on issues not raised by the pleadings."; *Mutual Ben. Health & Accident Ass'n v. Warrell* (96 Fed. 2nd 447) which ruled that the refusal of instructions requested on an issue not presented by the pleadings was proper; *U. S. Fidelity & Guaranty Co. v. McCarthy* (50 Fed. 2nd 2) which said that confining instructions requested to issues made up in the case does not constitute error; and *Union Pac. R. Co. v. Garner* (24 Fed. 2nd 53) which held, that when the defendant did not join issue with the plaintiff on a theory, an instruction given to the jury on a theory neither in the pleadings nor within the issues raised by the answer would be improper.

Appellant's citation of *Kimble v. Kiser* (59 Fed. 2nd 626) should be amplified to show that the Court's statement in reality holds against the giving of the desired instruction in the case at bar. In full, it reads:

"It seems to be the sound rule that instructions when proper, applicable to the case, and not previously given or covered in other instructions, should be given when requested at any time before the retirement of the jury. But it remains to be seen whether the instruction was a proper one and whether its refusal was prejudicial to the defendants," (the Court then holding that the instruction sought was not proper).

This desired instruction on last clear chance, being both improper and inapplicable to the case at bar, should thus have been denied even if it had been sought before the jury

was first charged. In addition, the record discloses that counsel for appellant merely said, "the last clear chance doctrine might be applied," but never asked for a specific instruction (R. 448). See *Tucker v. Loew's Theatre & Realty Corporation* (149 Fed. 2nd 677) holding that reversal is not ordinarily made on the inadequacy of instructions, unless definite instructions had been requested and refused.

4. The jury are the proper determiners of the facts, and their verdict in the case at bar was reasonable and just. In the District of Columbia, the Court of Appeals has ruled upon this question. One of the most recent decisions is *Gardner v. Capital Transit Co.* (80 U. S. App. D. C. 297, 152 Fed. 2nd 288) in which it was said, at page 300, that:

"It is not our duty to weigh the evidence, and the jury having heard the witnesses and reached the conclusion that the plaintiff was himself negligent or contributorily negligent, our duty, in the absence of error of law by the court, is to affirm the judgment."

In *Friedman v. Decatur Corporation* (77 U. S. App. D. C. 326, 135 Fed. 2nd 812), this Court ruled at page 330 that:

"The verdict of a jury, like the findings of a judge who tries a case without a jury, constitutes a final determination of disputed facts, where the evidence is of such character that intelligent persons may honestly differ as to what was actually proved."

Also see *MacDonald v. Schenkel* (74 App. D. C. 346, 125 Fed. 2nd 737), holding that when a question of fact was submitted to the jury under proper instructions, the jury verdict closes the question; and *Robertson v. Washington Ry. & Electric Co.* (51 App. D. C. 311, 279 Fed. 180), saying that where negligence was properly submitted to the jury, their findings on that issue will not be disturbed.

Other Federal Courts rule the same way, as in *Emanuel v. Kansas City Title & Trust Co.* (127 Fed. 2nd 175), where at page 180 it was said:

“It is elementary that in a trial of an action at law, the jurors are the sole and exclusive judges of the facts, of the credibility of the witnesses, and of the weight of the evidence. Evidence which is uncontradicted is not necessarily to be accepted as true. Its weight and the credibility of the witnesses who gave it are usually for the jury to determine.”

Also see *Swinger v. Fireman Equipment Corporation* (supra, p. 15), in which the Court said that, the facts in the case were not such that they could say as a matter of law that the appellant was free from negligence as charged, and the jury's findings that the appellant was negligent as charged was conclusive on them. And on the question of preponderance of evidence, which obviously does not mean the most or lengthiest testimony, see *Kelley v. Dickerson* (supra, p. 15), where the Court said that, although there was a conflict in the evidence, it was well settled that an appellate court could not determine the preponderance of the evidence for reasons which had often been stated. In that case, the Court went on to say that it could not be both a court of review and a trial court.

Therefore, appellee submits that the jury's verdict was well supported by the evidence, which was definitely in conflict, and their verdict should be sustained.

CONCLUSION.

Four errors are alleged by appellant as grounds for reversal. It is first contended that error occurred in the introduction of certain evidence. To much of this matter, no objection was raised, or else objection was made in general terms and not specifically. Thus, much of this disputed testimony should not have even been placed before this Court for review.

It is next contended that certain testimony taken out of the jury's presence should be admissible either to impeach, or else as *res gestae*. To admit as either, the burden lies upon the proponent to lay a proper foundation, which ap-

pellant failed to do in the case at bar. Its admission lay with the sound discretion of the trial Court as soundly exercised in the instant case.

The last major contention is that the trial judge should have charged the jury on the last clear chance doctrine. The Federal Rules of Civil Procedure specify that a pre-trial order frames the issues at trial. Thus, last clear chance, not having been raised by the pre-trial order, was not in issue.

The jury are the triers of the facts. Sufficient evidence existed to place the determination of the facts before the jury, and their verdict, being a reasonable one, should not be disturbed.

For these reasons, it is contended that the judgment of the lower court should be sustained.

Respectfully submitted,

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